

STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM WAYNE COUNTY CIRCUIT COURT

SOUTH DEARBORN ENVIRONMENTAL
IMPROVEMENT ASSOCIATION, INC., a Michigan
non-profit corporation; DETROITERS WORKING
FOR ENVIRONMENTAL JUSTICE, a Michigan
non-profit corporation; ORIGINAL UNITED
CITIZENS OF SOUTHWEST DETROIT, a Michigan
non-profit corporation; and SIERRA CLUB, a
California corporation,

Petitioners-Appellees,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL
QUALITY, a Department of the Executive
Branch of the State of Michigan; and DAN
WYANT, Director of the Michigan Department
of Environmental Quality,

Respondent-Appellants,

v

AK STEEL CORPORATION,
Appellee.

Supreme Court Nos. 154524, 154526
COA Docket No. 326485
Wayne CC. 14-008887-AA

**APPELLEES' SUPPLEMENTAL
BRIEF**

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APPELLEES' SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Do MCL 324.5505(8) and MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of the Department of Environmental Quality's issuance of the permit that the petitioners are seeking to challenge?

Appellees' answer: Yes.

The Court of Appeals answered: No.

The Circuit Court answered: Yes.

Appellant AK Steel answered: No.

Respondent-Below MDEQ did not answer in the trial court.

2. Was the decision by the Michigan Department of Environmental Quality to issue the permit subject to the contested case provisions of the Administrative Procedures Act, such that the 60-day deadline in MCR 7.119 for Appeals from Agencies Governed by the Administrative Procedures Act applies to this permit appeal?

Appellees/Respondents' answer: Yes.

The Court of Appeals answered: Yes

Appellant AK Steel answered: No.

Respondent-Below MDEQ did not answer in the trial court.

INTRODUCTION

In 2014, the Michigan Department of Environmental Quality (DEQ) amended a steel mill's air pollution control permit to raise the permitted emissions limits.¹ Because DEQ does not have the legal authority to revise an air permit in this way, 59 days after DEQ issued the permit, a coalition of citizens groups appealed the permit to Wayne County Circuit Court.

The present owner of the steel mill, AK Steel, and DEQ question whether the appeal was timely. The Circuit Court held that the appeal was timely under the 90-day deadline in Michigan's air pollution control statute,² and the Court of Appeals held it was timely under the 60-day deadline in MCR 7.119 for appeals of decisions by administrative agencies subject to the state's contested case statutory provisions.³ Both courts were correct, albeit for different reasons.

On Order of the Supreme Court issued April 7, 2017, this Court directed the parties to file supplemental briefs addressing whether the applicable time for filing a petition for review in this case is prescribed by the air pollution control statute – specifically, MCL 324.5505(8) and MCL 324.5506(14); or if not, whether the applicable time is prescribed by MCR 7.119(B)(1), rather than the time period in MCR 7.123(B)(1) and 7.104(A).

As briefed below, the time period for appealing the DEQ permit decision is prescribed by Michigan's air pollution control statute. Appellants AK Steel and DEQ will argue that there is a gap in the air pollution control statute such that the statute does not prescribe the time to file appeals of DEQ's decisions to issue or revise permits to install to existing sources. That

¹ DEQ Public Participation Documents, Fact Sheet (Feb. 12, 2014), Table 1, p. 4 (Appendix 1b).

² Part 55 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.5501 *et seq.*

³ MCR 7.119.

argument is wrong and should be rejected. But even if it were correct, DEQ's decision to revise the mill's permit to install was an agency decision subject to the Administrative Procedures Act (APA), and therefore the time period for appealing the permit decision is prescribed by MCL 7.119(B).

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The underlying case concerns the appeal of a type of air pollution permit known as a "permit to install." In 2014, the DEQ issued a permit to install to Severstal Steel, a Russian company, for its steel mill facility located in Dearborn, Michigan (the former Ford Rouge steel mill). This permit drastically raised the amount of pollution the facility is permitted to emit into the air. Several citizens groups challenged the permit on behalf of their members, who must breathe the polluted air downwind of the mill. Their permit challenge is based on the fact that DEQ has no authority to issue the permit, the permit is unprecedented both in the significant pollution increases it allowed and the novel (and unlawful) process DEQ employed to issue it, and DEQ also grandfathered the permit under 2007 air quality standards instead of 2014 standards. In 2014, shortly after DEQ issued the permit, AK Steel bought the facility from Severstal.

The steel mill is a major source of air pollution under state and federal law. DEQ regulates the steel mill under Part 55 of NREPA and DEQ's air pollution control rules.⁴ DEQ is also authorized by the U.S. Environmental Protection Agency (EPA) to administer the Clean Air Act.⁵ Under the Clean Air Act, EPA establishes "national ambient air quality standards"

⁴ MCL 324.5501 *et seq.*; Mich Admin Code R 336.1101 *et seq.*

⁵ 42 USC 7401 *et seq.*

(NAAQS). NAAQS define the maximum permissible amounts of certain pollutants in the ambient air, in order to protect public health and welfare.⁶ Areas where the air is within these limits are designated “attainment.” Areas where ambient air pollution exceeds these standards are designated “nonattainment.” Air pollution permit requirements for nonattainment areas are far more stringent than for attainment areas.

In 2006, DEQ issued an original permit to install to Severstal for plant upgrades. That permit was amended once in 2006, and again in 2007, to modify equipment or processes. The original trio of permits were called PTI Nos. 182-05, 182-05A and 182-05B.⁷

After the equipment was installed, in 2008 and 2009, Severstal performed “stack tests” to measure the pollution it was emitting. The results showed that several emissions sources at the steel mill exceeded the permit limits.⁸ DEQ issued a violation notice to Severstal on the basis of those stack tests.⁹ Severstal proposed to come into compliance with its permit by changing the permit emission limits.¹⁰ Severstal also proposed that DEQ should treat its permit as if it were still 2007, instead of applying the updated air protections that have been since 2007.¹¹

DEQ eventually agreed to this approach.¹² When DEQ issued the original PTI 182-05 permits in 2006 and 2007, the part of Wayne County where the steel mill is located was

⁶ 42 USC 7409(b)(1).

⁷ DEQ, Public Participation Documents, Fact Sheet (Feb. 12, 2014), pp. 1-2 (Appendix 1b, pp. 8b-9b).

⁸ *Id.*, pp. 2-6.

⁹ DEQ to Severstal North America Inc., Violation Notice (Feb. 24, 2009) (Appendix 2b, pp. 141b-142b).

¹⁰ *In the Matter of: Permit to Install Application No. 182-05C, Extension Agreement*, (Feb. 1, 2013), p. 2 (Appendix 3b, p. 147b).

¹¹ Severstal to DEQ, Permit Application letter (Sept. 12, 2012), pp. 4-7 (Appendix 4b, pp. 160b-163b).

¹² DEQ, Public Participation Documents, Fact Sheet (Feb. 12, 2014), pp. 2, 9 (changes to permitting regulations after October 2007 are not applicable to this permit action) (Appendix 1b, pp. 9b, 16b).

designated attainment for sulfur dioxide, but in 2013, it became designated as nonattainment for sulfur dioxide.¹³ Sulfur dioxide is a toxic gas that exacerbates respiratory illness and forms fine particles that cause emphysema and heart disease.¹⁴ DEQ applied the more lenient attainment standard (*i.e.*, “Best Available Control Technology”), not the more protective non-attainment standard (“Lowest Achievable Emissions Rate”) to evaluate the significant sulfur dioxide emissions increases.¹⁵

This and other unlawful and unauthorized decisions resulted in an “updated” or “revised” permit, which was released to the public in February 2014.¹⁶ Prior to making the final decision, DEQ engaged in an informal hearing process, which it described as follows:

Prior to acting on this application, the [DEQ Air Quality Division] is holding a public comment period and a public hearing to allow all interested parties the opportunity to comment on the proposed [permit.]. All relevant information received during the comment period and hearing, will be considered by the decision maker prior to taking final action on the application.¹⁷

At the public hearing and through timely written public comments, the citizens groups objected to the permit, including DEQ’s decision to apply regulatory grandfathering to the permit. Nonetheless, DEQ issued the permit, known as PTI No. 182-05C, on May 12, 2014.¹⁸ What AK Steel refers to as “updating” and “revision” of the air pollution limits in the permit are

¹³ 78 Fed Reg 47191 (Aug 5, 2013).

¹⁴ *Id.*

¹⁵ DEQ, Public Participation Documents, Fact Sheet (Feb. 12, 2014), p. 9 (Severstal updated its analysis for sulfur dioxide “as if the area were still in attainment.”) (Appendix 1b, p. 16b).

¹⁶ *Id.*, p. 2.

¹⁷ DEQ, Public Participation Documents, Fact Sheet (Feb. 12, 2014), p 1 (Appendix 1b, p. 8b).

¹⁸ DEQ Final Decision, PTI No. 182-05C (May 12, 2014) (Appendix 5b, p. 171b *et seq.*).

emissions limit increases measuring in the thousands of tons annually for certain pollutants and in hundreds of percentage points for toxic metals.¹⁹

The citizens groups appealed the permit in Wayne County Circuit Court on July 10, 2014, 59 days after DEQ issued the permit. AK Steel purchased the steel mill shortly thereafter. Five months later, on December 15, 2014, AK Steel filed a Motion to Dismiss for Lack of Jurisdiction in the Circuit Court, arguing that the citizens groups' appeal was untimely. DEQ took no position on the motion. At a hearing on February 12, 2015, the Circuit Court rejected AK Steel's motion because the appeal was filed within 90 days of the issuance of the permit under Part 55 of NREPA.

On March 18, 2015, AK Steel filed an application for leave to the Court of Appeals. DEQ again took no position in the appeal. The Court of Appeals granted AK Steel's application on August 27, 2015, and held oral argument on July 6, 2016.²⁰ On July 12, 2016, the Court of Appeals issued its opinion, holding that the Circuit Court erred in applying the 90-day appeal period mandated by Part 55 of NREPA, but nonetheless affirming the Circuit Court on other grounds. *South Dearborn Environmental Improvement Assn et al v Dept of Environmental Quality*, 316 Mich App 265, 891 NW2d 233 (2016). The Court of Appeals held that the appeal was timely filed within the 60-day period in MCR 7.119 for "agency decisions where [the APA] applies." The Court of Appeals rejected AK Steel's argument that the appeal was governed by the 21-day appeal period under MCR 7.123(B)(1) and MCR 7.104(A). On August 2, 2016, AK Steel and DEQ filed motions for reconsideration, which the Court of Appeals rejected on August 24, 2016, and September 21, 2016, respectively. The motions for reconsideration represented the

¹⁹DEQ, Public Participation Documents, Fact Sheet (Feb. 12, 2014), Table 6, pp. 15-19 (Appendix 1b, pp. 22b-25b).

²⁰ Transcript of Oral Argument in the Court of Appeals (July 6, 2016) (Appendix 6b, p. 324b *et seq.*).

first instance in which DEQ took a position on the timeliness of the citizen groups' appeal.

On October 5, 2016, AK Steel and DEQ applied for leave to appeal to the Michigan Supreme Court. The citizens group filed their answer in response to the applications on November 2, 2016. AK Steel filed a reply brief on November 22, 2016, and DEQ filed a reply brief on November 23, 2016. The Supreme Court issued an Order on April 7, 2017, ordering the parties to file supplemental briefs within 42 days of the Order. The citizens groups file this supplemental brief in accordance with that Order.

ARGUMENT

The Supreme Court should issue a final decision that Appellees filed a timely appeal of the DEQ's decision to revise the steel mill's permit to install. The appeal was timely under two alternative timelines: under the 90-day period prescribed by MCL 324.5505(8) and MCL 5506(14); and under the 60-day period in MCR 7.119(B)(1). MCL 324.5505(8) states that appeals of permits for existing sources are governed by MCL 324.5506(14), and MCL 324.5506(14) states that a petition for judicial review of a permit shall be filed within 90 days after the final permit action. Alternatively, the decision by DEQ – which is an APA agency, to revise the mill's permit – which is an APA license, was a licensing decision subject to the APA, and therefore subject to the 60-day appeal period in MCR 7.119(B).

I. The Permit Appeal was Timely under the 90-day Deadline in MCL 324.5505 and 324.5506.

This is an appeal of DEQ's decision to issue a permit to install to an existing source. The Michigan air pollution control statute provides that the period to bring such an appeal is 90 days after the permit is issued. Because this appeal was filed within that period, it was timely.

A. Standard of Review.

Questions of statutory construction are reviewed *de novo*. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). The primary goal of statutory construction is to effectuate the Legislature’s intent. *Id.* The first step is to review the text of the statute, and, if it is unambiguous, enforce the statute as written because the Legislature is presumed to have intended the meaning expressed in the statute. *Id.* When the language is clear, judicial construction is not permissible. *Id.*; see also *Petipren v Jaskowski*, 494 Mich 190, 201-02; 833 NW2d 247 (2013) (“If the language is clear and unambiguous, the statute must be enforced as written without judicial construction.”).

B. Part 55 Provides 90 Days to Appeal a Permit to Install for an Existing Source.

1. Applicable Statutory Sections:

Part 55 of NREPA governs air pollution permits.²¹ Section 5505 primarily governs permits to install.²² Subsection (8) of Section 5505 authorizes permit appeals. It sets forth a process for appeals of some types of permits, and governs appeals of other types via cross-reference to another section:

Any person may appeal the issuance or denial by the department of a permit to install, a general permit, or a permit to operate authorized in rules promulgated under subsection (6), for a new source in accordance with section 631 of the revised judicature act of 1961, 1961 PA 236, MCL 600.631. Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except

²¹ MCL 324.5501, *et seq.*

²² This Section also governs general permits and non-renewable operating permits.

that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review. Such a petition shall be filed no later than 90 days after the new grounds for review arise. **Appeals of permit actions for existing sources are subject to section 5506(14).** MCL 324.5505(8) (emphasis added).

The cross-referenced subsection, 5506(14), states:

A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. Any person may appeal the issuance or denial of an operating permit in accordance with section 631 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.631 of the Michigan Compiled Laws. **A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action.** Such a petition may be filed after that deadline only if it is based solely on grounds arising after the deadline for judicial review and if the appeal does not involve applicable standards and requirements of the acid rain program under title IV. Such a petition shall be filed within 90 days after the new grounds for review arise. MCL 324.5506(14) (emphasis added).

In short: the last sentence of Section 5505(8), which generally sets forth appeal procedures for permits to install, says that “appeals of permit actions for existing sources are subject to Section 5506(14).” Then the fourth sentence of Section 5506(14) says that “a petition for judicial review is the exclusive means of obtaining judicial review of a permit, and shall be filed within 90 days after the final permit action.” Prior to this case, it was generally considered

to be settled law that all petitions for judicial review of permit decisions under Part 55 were subject to the 90-day deadlines set forth in Sections 5505(8) and 5506(14).²³

2. Holdings Below by the Circuit Court and Court of Appeals on Part 55:

Based on the language of the statutory sections quoted above, the Circuit Court held that the 90-day time period applied to a petition for review of a permit to install for an existing source:

AK Steel argues this Court lacks jurisdiction because this appeal was filed 59 days after the permit was issued, which is beyond the 21 day filing period that AK Steel contends is applicable. MCL 324.5505 subsection eight of NREPA, what Counsel referred to as NREPA, states appeal[s] of permit actions for existing sources are subject to section 5506 (14). AK Steel emphasized that this cross referenced section, 5506 (14) is entitled, quote, operating permits, and that its subparts deal only with operating permits. But 5506(14) also includes this provision: “A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action.”

Granted, this provision appears within the context of this subsection’s discussion of operating permits, but it, nonetheless, uses the indefinite quote, a permit, close quote.

²³ The Michigan Appellate Handbook, select pages attached as Appendix 7b, p. 383b, states:

| | | |
|--|---|----------------------------|
| Air Pollution; appeal of permit decision of Department of Environmental Quality – to circuit court | Within 90 days of final permit action, or within 90 days after new grounds for review arise | MCL 324.5505(8); .5506(14) |
|--|---|----------------------------|

Further support is found in *Sierra Club v MDEQ*, __MichApp__ (No. 308072, Mar. 16, 2012), unpublished order of the Michigan Court of Appeals attached as Appendix 8b, p. 393b, which was also cited by the Circuit Court. In that case, the Court of Appeals held an appeal in abeyance for 90 days from the date on which a new permit to install was expected to be issued for an existing source. The Court of Appeals’ decision on the merit indicates that the permit at issue was to install equipment on an *existing source*, the DTE Monroe power plant. See *Sierra Club v MDEQ and Detroit Edison Company*, __MichApp__ (No. 308027, Nov. 21, 2013), attached as Appendix 10b, p. 402b *et seq.*

If AK Steel's interpretation is correct, it would have been more appropriate for the legislature to use more definite, as the permit, or even the operating permit. The alternative and in this Court's view proper interpretation is that the filing period is 90 days from the date the permit is issued.²⁴

The Court of Appeals disagreed with the Circuit Court on this point. However, the Court of Appeals reached its conclusion by considering only the language in the third and fourth sentences of Section 5506(14), and disregarding the cross-reference from Section 5505(8) entirely:

The parties agree that the resolution of this issue lies with the interpretation of the following portion of § 5506(14), which provides:

Any person may appeal the issuance or denial of an *operating permit* in accordance with [MCL 600.631]. A petition for judicial review is the exclusive means of obtaining judicial review of a *permit* and shall be filed within 90 days after the final permit action. [Emphasis added.] (Emphasis in Court of Appeals' opinion.)

There is no question that the first sentence pertains only to appeals related to the issuance or denial of *operating permits*. The parties differ on whether the second sentence above, which mentions "a permit," refers to the "operating" permit from the preceding sentence or "any" permit. See *Allstate Ins Co v Freeman*, 432 Mich 656, 744; 443 NW2d 734 (1989), citing Black's Law Dictionary (5th ed) (noting that the article "a" often is used to mean "any"). The circuit court, while acknowledging that the second sentence "appears within the context of this subsection's discussion of operating permits," nonetheless ruled that the second sentence allowed the appeal of any permit based exclusively on the view that "a" is to be interpreted as "any." [Emphasis in Court of Appeals' opinion.]

²⁴ Wayne County Circuit Court *SDEIA v DEQ et al*, Motion Hearing Transcript, pp 31-32 (Appendix 12b, pp. 444b-445b).

We disagree with the circuit court's ultimate interpretation and agree with AK Steel that the sentence in question refers to the preceding sentence. Thus, the statement, "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action," simply relates back to the preceding sentence, which described how any person can appeal the issuance or denial of an operating permit.²⁵

Having found that the permit appeal was not subject to the 90-day deadline in Part 55, the Court of Appeals concluded that, under MCL 600.631, the appeal deadline was instead set by the court rules.²⁶ As discussed further below, the Court of Appeals correctly held that, if the deadline was set by the court rules, then the applicable court rule would be MCR 7.119, which provides for a 60-day deadline. However, the Court of Appeals never needed to reach that point because the permit appeal was subject to the 90-day deadline in Part 55, making analysis of the applicable court rule deadline unnecessary.

3. The Express Cross-Reference from Section 5505(8) to Section 5506(14) should not be Read Out of the Statute.

Section 5505(8) governs permits to install, and expressly refers the reader to Section 5506(14) for appeals of permits for existing sources. Section 5505(8) does not refer only *operating permits* over to Section 5506(14) – it refers *permits* for existing sources over to Section 5506(14), without limitation. Then the fourth sentence of Section 5506(14) states that a petition for review filed within 90 days is the exclusive means for obtaining judicial review of a permit. It does not just provide the exclusive means for obtaining review of an *operating permit* – it provides the exclusive means for obtaining review of "a permit," without limitation.

²⁵ *SDEIA et al*, 316 Mich App 265 (Slip Opinion, p. 4).

²⁶ *Id.* at Slip Opinion p. 7.

The Court of Appeals reached a contrary conclusion from what it termed “the context” of Section 5508(14). However, the Court of Appeals did not attempt to interpret the cross-reference from Section 5505(8), nor did the Court of Appeals give any meaning to Section 5505(8), thus rendering the Section empty surplusage.

When interpreting a statute, an express cross-reference should be given greater weight than an inference based on context about the language to which the cross-reference refers. This is especially so when the inference based on context produces an interpretation that differs from the language’s literal meaning. Support for the proposition that an express cross-reference is more probative of the Legislature’s intent than an inference about context can be found in this Court’s recent cases on statutory interpretation. “Any statutory construction must begin with the statute’s plain language.” *Pirgu v United Services Automobile Ass’n*, 499 Mich 269, 278; 994 NW2d 257 (2016). “The words of the statute provide the best evidence of legislative intent and the policy choices made by the Legislature.” *People v Harris*, 499 Mich 332, 345 (2016). The judiciary should not “change the words of a statute in order to reach a different result.” *Id.*

This Court emphasized the importance of an express cross-reference to determining legislative intent in *Mayor of the City of Lansing v MI Public Service Comm’n*, 470 Mich 154; 680 NW2d 840 (2004). The issue in *City of Lansing* concerned state and local regulation of a petroleum pipeline, and the resolution required the Court to interpret Sections (1) and (2) of what was then MCL 247.183.²⁷ Subsection (1) authorized utilities to construct pipelines and other utility infrastructure within road rights-of-way, including within the rights-of-way of limited access highways, “subject to subsection (2).” Subsection (1) further required the utility to obtain the consent of the local unity of government before commencing the work. By contrast,

²⁷ The statute has since been amended in response to the decision.

subsection (2) allowed a utility to construct lines within the rights-of-way of limited access highways “in accordance with standards approved by the state transportation commission,” with no mention of the need for consent by the local unit of government.

The question presented in *City of Lansing* was whether a utility installing a line within a limited access highway right-of-way under subsection (2) was required to first obtain the consent of the local unit of government under subsection (1). Much like the Court of Appeals in this case, the utility in *City of Lansing* asserted that subsections (1) and (2) covered entirely distinct and separate situations. The utility argued that a construction project within a limited access highway right-of-way under subsection (2) needed only to follow state transportation commission standards, and did not need to obtain local consent under subsection (1).

Responding to the dissent, which agreed with the utility that the two subsections were completely independent of each other, the majority in *City of Lansing* wrote:

The law is not properly read as a whole when its words and provisions are isolated and given meanings that are independent of the rest of its provisions. This is especially true when, as here, one of these provisions *expressly cross-references* the other. (Emphasis in original.) 470 Mich at 168.

In the case at bar, Section 5505(8) of Part 55 discusses appeals of permits to install for new sources. It then states, “Appeals of permit actions for existing sources are subject to section 5506(14).” The set of possible permit actions for existing sources includes both decisions on operating permits, and also decisions on permits to install. The cross-reference does not limit which appeals of permit actions for existing sources it refers over to Section 5506(14). It refers all of them over to Section 5506(14).

On that last point – that the Legislature’s use of a term without restriction or limitation should be interpreted to include all instances of that term – this Court’s recent decision in *People*

v Feeley is instructive. 499 Mich 429; 885 NW2d 223 (2016). In *Feeley*, the Court was called to determine whether the statutorily undefined term “police officer” in the “resisting and obstructing” statute included reserve police officers. The Court held that, because the term police officer, in the absence of any restriction or limitation, would normally be understood to include all types of police officers; it should be read to include reserve police officers in the resisting and obstructing statute. “The Legislature has demonstrated its ability to adopt explicit restrictions to the definition of a ‘police officer’ when such restrictions are intended.” 499 Mich 440.

Similarly in this case, the use of the term “appeals of permit actions for existing sources” refers appeals of all types of permit actions for existing sources over to Section 5506(14). There is no basis for inferring that it refers over only appeals of operating permits for existing sources, and not permits to install for existing sources.

4. The Fourth Sentence of Section 5506(14) does not Apply Solely to the Permits Addressed in the Third Sentence of that Section.

Given that the cross-reference in Section 5505(8) unambiguously refers appeals of all permit actions for existing sources over to Section 5506(14); and that the fourth sentence of Section 5506(14) states that “a petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action;” that should be the end of the inquiry. Both sentences are unambiguous and without limitation.

Instead, however, the Court of Appeals held that the third sentence in Section 5506(14) provides context for an interpretation of the fourth sentence that restricts the fourth sentence to appeals of operating permits only, and not permits to install. That third sentence is: “Any person may appeal the issuance or denial of an operating permit in accordance with [MCL 600.631].”

The Court of Appeals held that the fourth sentence, “‘A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action,’ simply relates back to the preceding sentence, which described how any person can appeal the issuance or denial of an operating permit.”²⁸

The flaw in the Court of Appeals’ reasoning is that no word or phrase in the fourth sentence of Section 5506(14) specifically refers or relates back to the third sentence. And certainly not in a way that would justify giving the sentence an interpretation other than its literal meaning.

Notably, the fourth sentence does not say a petition for judicial review is the exclusive means of obtaining review of “the” permit – *i.e.*, the operating permit discussed in the third sentence. Instead, the fourth sentence uses the phrase “a” permit. The use of the indefinite article points to an interpretation of “permit” that is broad enough to receive the cross-reference from Section 5505(8) – much more strongly than it points to a narrow interpretation of “permit” that refers back only to the third sentence of Section 5506(14). In *Robinson v City of Detroit*, this Court held that the use of the term “the” proximate cause instead of “a” proximate cause in the governmental immunity statute meant the single proximate cause of an accident; rather than one of a set of proximate causes. 462 Mich 439, 438; 782 NW2d 171 (2000). The Court noted that the “Legislature has shown an awareness that it actually knows that the two phrases are different.” *Id.* at 460. See also *Massey v Mandell*, 462 Mich 375, 384 (2000) (“‘the’ does not mean ‘a’”).

In this case, if the Legislature had intended for the fourth sentence of Section 5506(14) to refer back only to the third sentence of that section – rather than to receive the cross-reference

²⁸ *SDEIA et al*, 316 MichApp 265 (Slip Opinion, p. 4).

from Section 5505(8) – the Legislature knew how to do so. Every other sentence in Section 5506(14) contains definite articles or modifiers to specify the relationship of the different sentences and phrases to each other:

- The first sentence in Section 5506(14) states that certain owners, who are required to obtain certain permits, may seek administrative review of a denial of the application for “such a permit,” or of a proposed revocation of “his or her permit.”
- The second sentence in Section 5506(14) identifies the applicable rules for “this review” – an explicit reference back to the preceding sentence regarding administrative review of certain permit decisions.
- The third sentence in Section 5506(14) provides for the appeal of the issuance of denial of “an operating permit” under MCL 600.631 – referring expressly to one type of permit.
- The fifth sentence in Section 5506(14) provides an extension for “such a petition” when the grounds for review arise solely after the 90-day deadline identified in the preceding sentence.
- The sixth and final sentence in Section 5506(14) identifies the 90-day extended deadline for “such a petition” identified in the preceding sentence, which references petitions for judicial review.

If, after referring appeals of permits to install for existing sources over from Section 5505(8), the Legislature had nonetheless wanted to exclude appeals of such permits from the fourth sentence of Section 5506(14), that would have been easy enough to do. The fourth sentence could have been phrased: “A petition for judicial review is the exclusive means of obtaining judicial review of such a permit and shall be filed within 90 days after the final permit

action.” But it was not. It could have been phrased: “A petition for judicial review is the exclusive means of obtaining judicial review of an operating permit and shall be filed within 90 days after the final permit action.” But it was not. The fact that this the fourth sentence is the *only* one in Section 5506(14) that uses broad language without definite articles or modifiers strongly suggests that this broad language was used for a reason – to receive the cross-reference from Section 5505(8).

This inclusive meaning of the word “permit” in the fourth sentence in Section 5506(14) is bolstered by its juxtaposition to the similar sentence in subsection 5505(8). See *Wolverine Power Cooperative, Inc. v Dept of Environmental Quality*, 285 Mich App 548, 562-64, 777 NW 2d 1 (2009) (meaning of subsection 5505(8) determined in context with 5506(14)). As quoted above, subsection 5505(8) provides generally for appeals of permit to install decisions for new sources. It provides, *inter alia*, as follows: “Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action”.²⁹ With one key substantive difference, this sentence from Section 5505(8) is strikingly similar to the fourth sentence in Section 5506(14): “A petition for judicial review is the exclusive means of obtaining judicial review of *a permit* and shall be filed within 90 days after the final permit action.” Thus, the operative sentence in Section 5505(8) uses a specific modifier (“such a permit”) but the otherwise-identical sentence in Section 5506(14) uses a generic modifier (“a permit”). That difference supports the broad interpretation of the fourth sentence in Section 5506(14).

²⁹ MCL 324.5505(8). The whole sentence says: “Petitions for review shall be the exclusive means to obtain judicial review of such a permit and shall be filed within 90 days after the final permit action, except that a petition may be filed after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review.”

In sum, not only did the Legislature chose different type of modifier (indefinite versus definite) for the fourth sentence than all the other sentences within subsection 5506(14), but it also used a different modifier than the almost-identical sentence in the related subsection 5505(8). The Court should interpret the statutes accordingly and give meaning to those differences.

5. Section 5506(14) is not limited to Appeals of Operating Permits.

The Court of Appeals supported its decision on the basis that Section 5506(14) applies to *operating* permits only, even though the Legislature used the indefinite article “a” preceding “permit” in the fourth sentence of the Section.³⁰ This analysis is not correct.

First, while the third sentence in subsection 5506(14) addresses operating permits (for new and existing sources), the first sentence addresses other permit types, including some permits to install. The first sentence in Section 5506(14) says:

A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit.

Breaking it down, this complex sentence allows certain sources³¹ to file a petition for administrative review of any of the following actions:

³⁰ *SDEIA et al*, 316 Mich App 265 (Slip Opinion, p. 4).

³¹ Specifically, the owner/operator of an existing source that is required to obtain an operating permit, a general permit (which include both permits to install and operating permits, see MCL 324.5501(m)), or a non-renewable operating permit.

- The denial of an application for “such a permit”, referring back to the list of permits in the preceding phrase – *i.e.*, an operating permit, a general permit, or a non-renewable operating permit. This provision is not limited to operating permits. It also includes general permits to install. See MCL 324.5501(m) (definition of “general permit” includes permits to install and operating permits); MCL 324.5505(4) and (5) (authorizing DEQ to issue a general permit for the installation, operation of certain sources, processes and equipment); DEQ Rule 336.1201a (General Permits To Install) (providing regulations for issuance of a general permit to install, covering numerous similar sources or emission units).
- The “revision of *any* emissions limitation, standard, or condition”. This provision is not limited to revisions to operating permits – general permits and permits to install contain emissions limitations, standards and conditions. See, *e.g.*, DEQ Rule 336.1201(3) (permit to install may be subject to any condition necessary to assure compliance); 336.1205(1)(a) (requiring permit to install to contain enforceable emission limits).
- The proposed revocation of “his or her permit.” This phrase refers to the revocation of *any* permit for an existing source, or at least to the revocation of any of the permits for existing sources listed in the prior provision (operating, general, and non-renewable operating permits). Either way, it includes some permits to install (“general permits” include permits to install).

Thus, Section 5506(14) is not limited exclusively to review of operating permits, but instead covers a variety of permits, for both new and existing sources.

Second, the fourth sentence in subsection 5506(14) provides the manner in which to appeal several permit actions, not only operating permits. Subsection 5505(14) as a whole addresses three categories of permit actions: (a) existing sources that have the right to seek a contested case and judicial review under the APA for the actions, as specified in the first two sentences of subsection 5506(14); (b) the issuance or denial of operating permits, whether for new or existing sources, as identified in the third sentence of subsection 5506(14); and (c) permit actions for existing sources, cross-referenced in the last sentence of subsection 5505(8). The fourth sentence in subsection 5506(14) provides how to appeal “a permit” in all of these categories – *i.e.*, by petition for judicial review filed within 90 days after the final permit action.³²

The Court of Appeals erred when it suggested that interpreting the *fourth* sentence to apply to more than operating permits would make the *third* sentence in subsection 5506(14) surplusage. The third sentence in subsection 5506(14) says, “Any person may appeal the issuance or denial of an operating permit in accordance with [MCL 600.631].” This sentence clarifies that, while the first two sentences of Section 5506(14) permit only certain people (owners and operators of existing sources) to seek a contested case and judicial review of certain permitting actions (including denial of an operating permit) under the APA,³³ any person may seek judicial review of the issuance or denial of an operating permit under the RJA.³⁴ In other words, it broadens the scope of *appellants* for operating permits, compared to the scope of

³² Under the Michigan Administrative Procedures Act, *absent a statute providing otherwise*, a petition for judicial review of an administrative decision must be filed within 60 days of a final decision. See MCL 24.102, 104. Subsection 5506(14) is a statute providing otherwise.

³³ MCL 24.201 to 24.328.

³⁴ MCL 600.631.

petitioners in the preceding sentence. The third sentence also provides for appeals related to operating permits for *new sources*. Absent the third sentence in subsection 5506(14), Part 55 would not provide any appeal for permit decisions for *new source* operating permits. In short, applying the fourth sentence to all permits does not render other parts of the statute superfluous.

6. Conclusion to Part 55 Argument.

To reach its holding on the Part 55 appeal deadline, the Court of Appeals cited context as the basis to interpret the fourth sentence of Section 5506(14) in a way that is different from its literal meaning. And the Court of Appeals did not give meaning to the cross-reference sentence in Section 5505(8) at all. As a result, the Court of Appeals concluded that, while permits to install for new sources are subject to the 90-day appeal deadline under Part 55; and operating permits for existing sources are subject to the 90-day appeal deadline under Part 55; appeals of permits to install for existing sources are not governed by Part 55 at all; and resort must be made to the court rules to determine the deadline for that one category of appeals. In other words, not only did the Legislature single out permits to install for existing sources as the *only* type of permit for which there would be were no right of review set forth in Part 55, it did so by implication, rather than expressly stating so.

The correct approach is to interpret the cross-reference sentence of Section 5505(8) to have its literal meaning; and also to interpret the fourth sentence of Section 5506(14) to have its literal meaning. Not only is this proper statutory construction, but the result of this approach is that all appeals of air pollution permits under Sections 5505 and 5506 have the same 90-day deadline. For these reasons, the Part 55 prescribes a 90-day appeal applicable to DEQ's decision.

II. MCR 7.119 Applies Here and Establishes a 60-day Appeal Period.

The citizens groups' appeal of PTI 182-05C was timely under MCR 7.119 if it is an appeal "from an agency decision where MCL 24.201 *et seq.* applies." MCL 24.201 *et seq.* is the Michigan Administrative Procedures Act (APA). A state agency's decision to revise a state pollution license is an agency decision to which the APA applies. Therefore, the 60-day appeal period prescribed by 7.119(b)(a) applies to DEQ's decision to revise the mill's permit.

A. Standard of Review.

The interpretation of court rules and statutes presents an issue of law that is reviewed *de novo*. *Assoc of County Clerks v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002); *Casco Twp v Secretary of State*, 472 Mich 566, 571 (2005). The primary goal of court rule interpretation is to effectuate the drafter's intent. *Varran v Granneman*, 312 Mich App 591, 599; 880 NW2d 242 (2015). The Court must give language that is clear and unambiguous its plain meaning and enforce it as written. *Id.* When the language is clear, judicial construction is not permissible. *Petipren v Jaskowski*, 494 Mich 190, 201-02 (2013) ("If the language is clear and unambiguous, the statute must be enforced as written without judicial construction.").

B. DEQ's Decision to Issue PTI 182-05C was Subject to the APA.

Section 631 of the Revised Judicature Act (RJA) states that, if judicial review of an agency decision "has not otherwise been provided for by law,"³⁵ an appeal "shall be made in

³⁵ As discussed above, it is the position of the citizens groups that Part 55 of NREPA provides for judicial review of the permit to install at issue in this case, and it provides a 90-day deadline to appeal the issuance of a permit to install.

accordance with the rules of the Supreme Court.” MCL 600.631. Thus, in an RJA Section 631 appeal, unless a statute provides otherwise, the applicable court rule sets the deadline.

In this case, unless the Michigan air pollution control statute applies (as discussed above), the applicable court rule would be MCR 7.119. It provides:

**RULE 7.119 APPEALS FROM AGENCIES GOVERNED BY
THE ADMINISTRATIVE PROCEDURES ACT**

(A) Scope. **This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 et seq. applies.** Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.

(B) Appeal of Right.

(1) Time Requirements. Judicial review of a final decision or order shall be by filing a claim of appeal in the circuit court **within 60 days after the date of mailing of the notice of the agency’s final decision** or order.

As described below, DEQ’s decision to issue the permit to Severstal was “an agency decision where MCL 24.201 *et seq.* applies.” Thus, the appeal of that permit was timely under MCR 7.119 because it was filed 59 days after DEQ issued the permit.

1. DEQ is an APA agency, PTI-182-05C is an APA license, and DEQ’s decision to issue the license was APA licensing.

There is no question DEQ is an *agency* under the APA, the permit is a *license* under the APA, and DEQ’s decision to issue the permit was *licensing* under the APA. The APA defines *agency*, *license*, and *licensing* as follows:

“Agency” means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the

state civil service commission, or an association of insurers created under the insurance code of 1956, 1956 PA 218, MCL 500.100 to 500.8302, or other association or facility formed under that act as a nonprofit organization of insurer members. MCL 24.203(2).

“License” includes the whole or part of an agency *permit*, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license required solely for revenue purposes, or a license or registration issued under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923. MCL 24.205(1) (emphasis added).

“Licensing” includes agency activity involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license. MCL 24.205(2).

Applying the above definitions, DEQ is an *agency* under the APA because it is a state department created by statute and authorized by executive order to administer the state’s air pollution control regulatory regime. *See Wolverine Power Supply Coop Inc v Dept of Env’t Quality*, 285 Mich App 548, 559; 777 NWd 18 (2009).

The steel mill’s permit is a *license* under the APA, and no party or court has suggested otherwise in this proceeding. *See Bois Blanc Island Twp v Nat Res Comm*, 158 Mich App 239, 242; 404 NW2d 719 (1987) (broad definition of *license* in APA “evidences a legislative intent to include practically any form of permission required by law.”); *see also SDEIA et al*, 316 Mich App at __ (Slip Opinion at p. 6) (citing DEQ website publication, *Air Permits (Permits to Install)*³⁶, which states, “A Permit to Install is a state license to emit air contaminants into the ambient air.”). Counsel for AK Steel acknowledged the permit is an APA *license* in oral argument at the Court of Appeals:

THE COURT: Is the permit a license?

MR. HALL [Counsel for AK Steel]: *It probably fits within the definition of a license.*

³⁶ https://www.michigan.gov/deq/0,4561,7-135-3310_70487-11390--,00.html.

THE COURT: So we've got the Administrative Procedures Act to deal with then?

MR. HALL: That will be an issue to deal with.

THE COURT: All right.³⁷

Finally, DEQ engaged in *licensing*, as defined in the APA, because the agency activity here involved the granting or amendment of an APA *license*. DEQ explained its activities in its Public Participation Documents, Fact Sheet, as follows:

The [DEQ] Air Quality Division (AQD) is proposing to act on Permit to Install application No. 182-05C for Severstal Dearborn LLC. The permit application is for the proposed changes to the allowed emissions from the B and C Blast Furnace Operation and other associated equipment. . . . There will not be any physical changes, changes to the method of operation, or increase in annual production rate/throughput for the equipment at the stationary source beyond what was approved in current TPI 182-05B. The proposed project is subject to permitting requirements of the Department's Rules for Air Pollution Control. Prior to acting on this application, the AQD is holding a public comment period and public hearing to allow all interested parties the opportunity to comment on the propose PTI. All relevant information received during the comment period and hearing, will be considered by the decision maker prior to taking final action on the application.³⁸

Thus, DEQ was engaged in activities involving the granting and amendment of a license. *See SDEIA et al*, 316 Mich App at 240 (Slip Opinion at p. 6) (DEQ decision to issue permit is equivalent to granting a license, which is covered under Chapter 5 of the APA.). Moreover, no party or court in this proceeding has argued DEQ was *not* engaged in licensing, with respect to its decision to issue PTI 182-05C.

As these definitions apply to the activity at issue in this proceeding, DEQ's decision to issue the permit was "an agency decision where [the APA] applies," and therefore it is subject to MCR 7.119. The Scope section of MCR 7.119 is phrased broadly: it does not specify how the

³⁷ Transcript of Oral Argument in Court of Appeals, p. 5 (Appendix 6b, p. 347b) (emphasis added).

³⁸ *See* DEQ Public Participation Documents, Fact Sheet, (Feb. 12, 2014), p. 1, (Appendix 1b, p. 8b).

APA must apply to the agency decision, nor does it limit which provisions of the APA must apply, nor does it require that a specific provision of the APA must apply to the agency's decision. In deciding whether to grant, deny, or amend the steel mill's air emissions license, DEQ was engaged in licensing, and its decision to grant and amend the steel mill's license is a decision where the APA applied. Under the plain language of the Rule and the APA, that is sufficient to bring the decision within the scope of MCR 7.119.

AK Steel has argued that MCR 7.119 does not apply here because, in order for the APA to apply to a decision, there must be more than an APA agency engaging in APA licensing.³⁹ DEQ has argued that MCR 7.119 applies only following an APA contested case.⁴⁰ In other words, both AK Steel and DEQ have taken the position that the APA does not apply to an APA *agency's* decision to issue an APA *license* following APA *licensing* activities. This position is untenable.

First, Section 113 of the APA, titled "Effective date and applicability," states that, except as to proceedings pending on July 1, 1970, the APA applies to "all agencies and *agency proceedings* not expressly exempted." MCL 24.313 (emphasis added). As described above, DEQ is an agency as defined by the APA, and it engaged in agency proceedings that resulted in the decision to amend PTI 182-05B and issue PTI 182-05C. There is no express exemption for this type of proceeding, and obviously it was not pending on July 1, 1970. By meeting the APA definitions for *agency*, *license*, and *licensing*, and without any express exemption from the APA, by its terms, the APA applies to the proceeding. As such, AK Steel's and DEQ's position that the

³⁹ AK Steel, Reply in Support of Application for Leave to Appeal, Nov. 23, 2016, p. 3.

⁴⁰ DEQ, Application for Leave to Appeal, Oct. 5, 2016, p. 12. We address DEQ's argument further below.

APA only applies to a subset of agency proceedings is contrary to the APA's directive of broad applicability.

Moreover, the Supreme Court has recognized that the APA applies to even informal agency proceedings. In *Westland Convalescent Center v Blue Cross & Blue Shield of Michigan*, the state's Insurance Commissioner held a public hearing – but not an APA-contested case – on whether proposed rates were fair and reasonable, 414 Mich 247, 260; 324 NW2d 841 (1982). The record of the administrative public hearing consisted of approximately 100 pages, including statements from various representatives, and indicated the Commissioner and staff “asked a few questions during the hearing.” 414 Mich at 289. The Supreme Court considered whether the public hearing before the Insurance Commission was legally sufficient, or if a contested case was required. The lead opinion concluded as follows:

The Administrative Procedures Act, in the absence of an explicit statutory requirement that an evidentiary hearing be held, guarantees that administrative hearings, *however informal*, comport with the notions of fairness embodied in the requirements of procedural due process. This hearing has done so. 414 Mich at 273 (emphasis added).

The concurring opinion agreed that no contested case was required, *id* at 282, but the dissenting opinion concluded that the Commissioner's decision was insufficient because the record did not establish supporting findings of fact and conclusions of law. *Id.* at 295. So while the *Westland* lead and dissenting opinions reached opposite conclusions as to whether fairness was provided in that case, both opinions supported the principle that even informal agency proceedings must ensure APA-guaranteed fairness. This is further support for the conclusion that the APA applies to even informal agency proceedings.

Similarly, in *Michigan Cannery & Freezers Assoc v Agricultural Marketing & Bargaining Board*, the Supreme Court held that the APA applies to an agency decision when all

the “*definitional elements*” of a contested case were present, even where the statute required only a “public hearing.” 416 Mich 706, 738-39; 332 NW2d 134 (1982), *rev. on other grounds*, 467 US 461 (1984). That case further held that APA applicability depends on the definitions in the APA, not whether there is an explicit reference to the APA in the relevant statute:

We cannot find, as defendants have, a legislative intent inherent in [Agricultural Marketing and Bargaining Act] AMABA to foreclose application of the APA to AMABA’s accreditation proceedings. The failure of AMABA to make specific reference to the APA in the accreditation provisions, while making specific reference to it in three other AMABA provisions, n24 does not, as defendants contend, require application of the maxim *expressio unius est exclusio alterius* and the conclusion that the Legislature did not intend the APA to apply to board accreditation. This is so because the **APA defines its own applicability and is not dependent upon express legislative invocation**. The applicability of the APA, absent an express exclusion, is governed by a determination whether the statutory agency action falls within the APA’s purview. We have concluded, in the present context, that board accreditation proceedings are contested cases within the meaning of the APA. There being no express legislative statement in the AMABA excluding the APA’s application, our inquiry is at an end. The APA is applicable. 416 Mich at 739.

The Supreme Court in *Michigan Cannery* found all the elements required for a contested case to be present in that proceeding, including the opportunity for an evidentiary hearing. *Id.* at 738-39. However, the Court’s holding related to the applicability of the APA is broad, and indicates that APA applicability is defined by the terms of the APA, not by specific Legislative invocation. This holding further supports the conclusion that APA applies here, where the DEQ permit decision meets the “definitional elements” of APA-licensing.

In sum, AK Steel’s and DEQ’s position that DEQ’s decision to amend the steel mill’s permit was exempt from the APA is not supported by Michigan law. Rather, the APA is a comprehensive statute by its terms, and as described by the Supreme Court. An APA agency

engaged in APA licensing proceedings is subject to the APA. Because the APA applies to this decision, the appeal of that decision is within the scope of MCR 7.119.

2. Section 92(1) of the APA Applied to DEQ's Decision to Amend the Steel Mill's Permit.

MCR 7.119 governs this appeal for the additional reason that DEQ's proceeding to amend the steel mill's emissions permit was subject to Section 92(1) of the APA. That provision states:

Before beginning proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, an agency shall give *notice*, personally or by mail, to the licensee of facts or conduct that warrants the intended action. The licensee shall be given an *opportunity to show compliance* with all lawful requirements for retention of the license[.] MCL 24.292(1) (emphasis added).

This section of the APA requires that, prior to a formal contested case over whether a licensee's license may be amended or revoked, the state agency must provide preliminary notice of the facts and an informal opportunity to show compliance with all lawful requirements. *See Rogers v State Bd of Cosmetology*, 68 MichApp 751, 755-756; 244 NW2d 20 (1976). The situation in *Rogers* involved a licensee who was allegedly acting in violation of state licensing requirements, and the regulating agency sought to revoke the license. 68 Mich App at 752. The court found that the APA requires a license revocation proceeding to be a contested case. *Id* at 755. It further found that, where it applies, Section 92(1) requires an additional step over and above the contested case – *i.e.*, an informal opportunity to show compliance with all lawful requirements. *Id.*

By its plain terms, Section 92(1) includes prerequisite procedures that an agency must take before it may *amend* a license. MCL 24.292(1). While the term “amendment” is not defined in the APA, the dictionary defines it as follows:

1. A formal revision or addition proposed or made to a statute, constitution, or other instrument.
2. The process of making such a revision.
3. A change made by addition, deletion, or correction; an alteration in wording. Black's Law Dictionary (7th ed. 1999).

In issuing PTI 182-05C, DEQ purported to amend the steel mill's existing permit, PTI 182-05B.⁴¹ Specifically, DEQ changed or revised the steel mill's emission limits in PTI 182-05B.⁴² DEQ stated in its Public Participation Documents, Fact Sheet, that the permit application "is for the *proposed changes* to the allowed emissions from the B and C Blast Furnace Operation and other associated equipment" and that PTI 182-05C would "*Revise the PTI 182-05 series of permits* by reallocating SO₂ emissions within the stove and casthouse stacks at the blast furnaces."⁴³ Because DEQ was amending the steel mill's license, Section 92(1) of the APA applied to DEQ's licensing action.

MCL 24.292(1) required DEQ to provide the mill with notice of the facts or conduct warranting the amendment, and to give Severstal an opportunity to "show compliance" prior to amending the prior licenses. In February 2009, DEQ did that when it issued a Notice of Violation to Severstal, documenting that the company was in violation of the emissions limits in

⁴¹ One of the substantive issues in this appeal concerns DEQ's legal statutory authority to make the amendment, which the citizens groups contend DEQ lacks. There is no question, however, that the permit action here purported to be an amendment of the mill's existing license.

⁴² DEQ Public Participation Documents, Fact Sheet, Feb. 12, 2014, pages 4-6, Table 1, Summary of Limits Included in PTI 182-0B and Stack Test Results; pages 15-18, Table 6, Source & Pollutants with Proposed Changes in Permit Limits (Appendix 1b).

⁴³ DEQ Public Participation Documents, Feb. 12, 2014, pp. 1, 2 (Appendix 1b) (emphasis added). *See also id.*, page 10 ("The revisions proposed by this permit action (182-05C) do not involve any physical changes or changes in the method of operation at the stationary source beyond what was approved in PTI 182-05B.") (emphasis added); DEQ Final Decision, PTI 182-05C (May 12, 2014) (Appendix 5b, p. 171b) ("Proposed correction to PTI 182-05B for the Severstal Dearborn facility located in Dearborn, MI. This correction is to update emission factors from the previously application based on recent emissions test data") (emphasis added).

PTI 182-05B.⁴⁴ The Violation Notice specified the precise terms of PTI 185-02B that were being violated: for example, PTI 182-05B permitted carbon monoxide (CO) emissions from the mill's Basic Oxygen Furnace Electrostatic Precipitator (BOF-ESP) at the rate of 3,057.4 pounds per hour (lb/hr), but stack tests measured CO emissions at the BOF-ESP at the rate of 3,272.2 lb/hr.⁴⁵ The Violation Notice further provided the steel mill with the opportunity to show compliance:

Please initiate actions necessary to correct the cited violations and submit a written response to this Violation Notice by March 17, 2009 (which coincides with 21 calendar days from the date of this letter). The written response should include: the dates the violation occurred; an explanation of the causes and duration of the violations; whether the violations are ongoing; a summary of the actions that have been taken and are proposed to be taken to correct the violation and the dates by which these actions will take place; and what steps are being taken to prevent a reoccurrence.⁴⁶

Following this, DEQ and Severstal engaged in protracted negotiations to address the violations, as described in an "Extension Agreement" executed by DEQ and Severstal:

Post-construction performance testing conducted in 2008 and 2009 revealed that certain emission [*sic*] were above the limits [in PTI No. 182-05, PTI No. 182-05A, and PTI No. 1820-05B]. In February 2009, Severstal initiated discussions with MDEQ to establish a process to address these emission limit issues and to identify a process to account for new information, including evaluation of control technologies, a review of raw material usages, additional performance testing, and ultimately development of an application for PTI No. 182-05C.⁴⁷

⁴⁴ DEQ to Severstal North America, Inc., Violation Notice (Feb. 24, 2009) (Appendix 2b, pp. 141b-142b).

⁴⁵ *Id.* The Violation Notice identified violations of multiple pollutants at multiple stacks.

⁴⁶ *Id.*

⁴⁷ *In the Matter of: Permit to Install Application No. 182-05C: Extension Agreement* (Feb. 1, 2013), page 2 (Appendix 3b, p. 147b). The citizens groups' appeal challenges DEQ's authority to execute such an agreement, and this document is cited to show DEQ's and Severstal's recitation of the process.

Although the citizens groups' appeal challenges DEQ's authority to resolve the emissions violations by amending the permit, that is what DEQ did here. Section 92(1) of the APA applies to DEQ's licensing decision in this case because the decision is the result of an APA agency proceeding to amend an APA license.

AK Steel has argued that Section 92(1) of the APA does not apply in this situation because – rather than the *agency* invoking a revocation proceeding – the *licensee* sought a material change to the terms of its existing permit.⁴⁸ AK Steel cites no authority for this distinction, and it is not supported by the plain language of the statute.⁴⁹

Moreover, AK Steel misstates the situation here: although DEQ did not invoke a formal revocation proceeding, DEQ did invoke an enforcement proceeding with the February 2009 Violation Notice. The applicant (Severstal) then applied to amend the license in order to resolve its violations and avoid permit revocation. But for the applicant-proposed solution (a license amendment⁵⁰), DEQ was required by its rules, in this situation, to revoke the mill's permit:

If evidence indicates that the process or process equipment is not performing in accordance with the terms and conditions of the

⁴⁸ AK Steel, Reply Brief, p. 8.

⁴⁹ Even if AK Steel were correct, and it (rather than DEQ) was responsible for initiating the proceeding here, then that would trigger a different section of the APA, MCL 24.291(2). That Section provides “When a licensee makes timely and sufficient application for renewal of a license or a *new license with reference to activity of a continuing nature*, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court.” Here, Severstal sought “updated” or “amended” emissions limits applicable to existing emissions sources. The permit that DEQ ultimately issued replaced a prior emissions permit, PTI 182-05B. Severstal continued to operate under the prior emission limits, and it remained in force until DEQ issued the replacement permit. As such, the application was for a license with reference to activity of a continuing nature, and this provision of APA is applicable.

⁵⁰ There is no provision in Michigan's air emission statutes or rules authorizing DEQ to amend a permit to install, and this is another aspect of DEQ's permit decision that the citizens groups' appeal challenges.

permit to install, the department, after notice and opportunity for a hearing, may revoke the permit to install consistent with section 5510 of the act. Upon revocation of the permit to install, operation of the process or process equipment shall be terminated. Revocation of a permit to install is without prejudice and a person may file a new application for a permit to install that addresses the reasons for the revocation. MDEQ Rule 336.1201(8).

Thus, the situation here is entirely consistent with Section 92(1) of the APA: DEQ initiated the proceeding with the Violation Notice, and Severstal's permit application was part of DEQ's (unlawful) proceeding to amend the license in order to resolve the mill's emissions violations. MCL 24.292(1) does not require DEQ to initiate formal revocation proceedings; a proceeding to amend the license triggers the statute. That DEQ and Severstal agreed to resolve the mill's emissions violations by permit amendment, bypassing formal revocation provided by DEQ's rule, is not relevant to whether MCL 24.292(1) applied to this proceeding. The DEQ license amendment proceeding was subject to the APA.

AK Steel also has argued that APA Section 92(1) does not apply because Severstal was not aggrieved by DEQ's decision.⁵¹ Regardless of whether the DEQ initiated formal revocation proceedings under its rules, whether the steel mill was aggrieved by any decision by DEQ, or even whether there was a contested case, DEQ was bound by MCL 24.292(1) to provide certain protections to the mill in its proceeding to amend the permit.⁵² Thus, the APA applies to this licensing decision by DEQ, and the appeal of the decision is under MCR 7.119.

3. MCR 7.119 is not limited to appeals of decisions in contested cases.

⁵¹ AK Steel, Reply Brief, p. 8.

⁵² The citizens groups maintain that DEQ lacked legal authority to amend the permit.

DEQ has taken the position that MCR 7.119 applies to appeals of licensing decisions only where there was a contested case.⁵³ This conclusion is not correct. First, there is nothing in MCR 7.119 that states or implies that this court rule applies only where the APA *contested case provisions* apply. Instead, MCR 7.119 is drafted broadly, to include agency decisions “where [the APA] applies.” Interpreting the rule as DEQ suggests, to limit the rule only to contested cases, is contrary to its plain language, and hence would constitute impermissible judicial construction. *Petipren*, 494 Mich at 201-02. Moreover, DEQ has cited no authority for this interpretation of MCR 7.119.

DEQ’s position is also contrary to the history of MCR 7.119. Former MCR 7.105, which MCR 7.119 replaced, was limited to appeals following contested case decisions. But former MCR 7.105 was repealed in 2012, and replaced by present MCR 7.119, which is much broader in scope. Former MCR 7.105 stated:

RULE 7.105 APPEALS FROM ADMINISTRATIVE AGENCIES
IN “CONTESTED CASES”

(B) Scope... (1) **This rule governs an appeal to the circuit court from an agency decision in a contested case,** except when a statute requires a different procedure.⁵⁴

This Court made two pertinent changes when it adopted MCR 7.119. First, it changed the title of the Rule from “Appeals from administrative agencies in contested cases” to “Appeals from Agencies governed by the Administrative Procedures Act.” Although the title of the section is not decisive, it is an instructive fact supporting the interpretation of the statute. *See*

⁵³DEQ Application for Leave to Appeal, Oct. 5, 2006, p. 10; DEQ Reply Brief (in Application for Leave to Appeal), Nov. 23, 2016, pp. 3-5.

⁵⁴ A copy of the former MCR 7.105 is attached as Appendix 9b, pp. 396b *et seq.*

Hanselman v Killeen, 419 Mich 168, 180; 351 NW2d 544 (1984) (title of APA supported court's interpretation of term defined in APA).

Second, the Supreme Court replaced the words “an agency decision in a contested case” in former MCR 7.105 to “an agency decision where MCL 24.201 et seq. applies” in the present rule. The citation to MCL 24.201 *et seq.* is a reference to the entire APA, not just to the contested case provisions of the APA. MCL 24.201 is the first section in the APA, and Black's Law Dictionary (7th edition) defines “*et seq.*” as “And those (pages or sections) that follow.” See *Sam v Balardo*, 411 Mich 405, 430-433; 308 NW2d 142 (1981) (removal from statute of language of limitation is clear and specific indication of legislative intent to change the substantive meaning of the statute and effect a change in legal rights). Together, these two changes show that the drafters of MCR 7.119 intended to expand the types of cases subject to the rule to all appeals of agency decisions where the APA applies, not just contested cases decisions.

In support of its position, DEQ suggested that, if MCR 7.119 applies to agency appeals beyond contested cases, then MCR 7.123 becomes meaningless. MCR 7.123 applies to appeals “from an agency decision that is not governed by another rule in the subchapter.” MCR 7.123(A). The language of MCR 7.119 and 7.123 plainly show that they cover different things – appeals from APA agencies' decisions (7.119) and appeals from non-APA-agencies' decisions.

This conclusion is further supported by the Committee Comment on MCR 7.119:

MCR 7.119 is based on the Administrative Procedures Act (APA), MCL 24.201 *et seq.*, particularly MCL 24.301, MCL 24.302, and MCL 24.306. MCR 7.119 substantially changes the procedures in former MCR 7.105.

Not every agency as defined in MCR 7.102(1) is subject to the APA. **An agency is subject to the APA if:**

1. **The agency meets the definition of an agency in MCL 24.203(2);**

2. A statute or constitutional provision subjects the agency to the APA; or

3. An agency with rulemaking power adopts a rule subjecting itself to the APA. 489 Michigan Reports Special Orders at 1273.⁵⁵

Moreover, the APA lists an array of agencies that are not subject to the APA, including “an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code [], or another association or facility formed under that act as a non-profit organization of insurer members.” MCL 24.203(2). As such, there are many “agencies” whose decisions are not subject to MCR 7.119, and thus may be subject to MCR 7.123. See *Hanselman v Killeen*, 419 Mich 168, 180-81; 351 NW2d 544 (1984) (county concealed weapon licensing board is not an “agency” subject to APA); *Righter v Civil Service Com.*, 1 Mich App 468, 472; 136 NW2d 718 (1965), lv denied, 337 Mich 686 (1966), (APA does not apply to municipal agencies).

Moreover, while DEQ’s decision in this case was a licensing decision, which is subject to the APA, other decisions of an APA-agency may be outside the APA. For example, state agencies’ contractual decisions may be outside the APA. See *Greenfield Const. Co. v MI Dept of State Highways*, 58 Mich App 49, 56-58, 227 NW2d 223 (1975), *aff’d on other grounds*, 402 Mich 172; 261 NW2d 718 (1978). MCR 7.123 may provide for appeals of such decisions. In sum, contrary to DEQ’s argument, acknowledging that MCR 7.119 applies to the appeal of a decision by an APA-agency engaged in APA-licensing – even if there was no “contested case” – would not render MCR 7.123 “meaningless.”

⁵⁵ MCR 7.119, Committee Comment (Appendix 11b, p. 409b *et seq*).

DEQ has also previously argued that MCR 7.119 must apply only to contested case decisions because the appeal process in MCR 7.119 parallels the APA provisions for judicial review of contested case decisions – specifically, Section 104, 105 and 106 of the APA.⁵⁶ This argument is unavailing, as well.

First, MCR 7.119 and the APA contain similar provisions in part because they both address the same subject matter – *i.e.*, appeals of administrative decisions. Court rules for appeals of other types of administrative decisions (other than MCR 7.119) also contain similar language to the APA provisions for appeals from contested cases. For example, MCL 24.306(1)(d) states the circuit court shall set aside an agency decision that is “not supported by competent, material and substantial evidence on the whole record.” Similar or identical language is found in MCR 7.119(H)(1), as well as in MCR 7.116(G) (Appeals Under the Michigan Employment Security Act), MCR 7.120(G)(3)(d) (Licensing Appeals Under the Michigan Vehicle Code), MCR 7.122(G)(2) (Appeals from Zoning Ordinance Determinations), and MCR 7.123(G)(1) (Appeals from Agencies Not Governed by Another Rule). Identifying the similarities between provisions that cover at least some of the same material is not illuminating.

Second, that there are similarities between MCR 7.119 and the APA provisions for judicial review of contested cases does not mean the scope of these provisions is identical. Rather, the similarities ensure uniformity between rules that cover *some* of the same types of appeals – *i.e.*, appeals from decisions in contested cases. For example, it is rational to have identical appeal timeframes in MCR 7.119 and MCL 24.304 to ensure consistency; differing appeals periods would create conflict and confusion for appeals of contested case decisions. That the court rule and the APA include identical timeframes is a reasonable correlation between

⁵⁶ DEQ Reply Brief (in Application for Leave) (Nov. 23, 2016), pp. 4-5.

sometimes-overlapping provisions; it does not support DEQ's conclusion that MCR 7.119 is limited to contested case appeals.

Third, in addition to some similarities, there are also some differences between MCR 7.119 and the APA judicial review provisions. For example, the statute, MCL 24.306(1), identifies two additional grounds for reversal, which are not addressed in the court rule, MCR 7.119(H): subsection (b) (where the decision is in excess of the statutory authority or jurisdiction of an agency) and (e) (where the decision is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion). Further, the court rule, MCR 7.119(E), articulates standards for when an agency's decision may be stayed, whereas the APA, MCL 24.304(1), does not. Additionally, MCR 7.119(D) allows late appeals when permitted by statute; while the APA has no such provision. Finally, MCR 7.119(H)(2) requires the reviewing court to specifically identify the agency's conclusions of law that are being reversed; once again, the APA has no such provision.

In sum, there are both similarities and differences between the court rule and APA judicial review provisions for contested case. That there are similarities between the court rule and APA judicial review provisions for contested case does not mean they were intended to cover identical subject matter. The Court should reject DEQ's interpretation of MCR 7.119 as only governing appeals from contested case decisions.

4. The APA Applies here because Severstal had the Right to a Contested Case.

As described above, because this is an appeal from the decision of an APA-agency engaged in APA-licensing, or because APA Section 92(1) applied to DEQ's decision to amend

the steel mill's permit, this is an appeal of an agency decision where the APA applies, so MCR 7.119 governs it.

In addition, due process and statutory considerations required DEQ's decision here to be preceded by notice and an opportunity for a contested case hearing. Section 91(1) of the APA states, "When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply." MCL 24.291(1). Severstal was a licensee with an existing permit (PTI 18-2-05B), which was amended by DEQ with PTI 182-05C; Severstal was not an applicant for a new permit.⁵⁷ As a result, under three different legal bases (described below), Severstal was entitled to notice and an opportunity for a hearing. Thus, the APA applied to DEQ's licensing decision in this case, and, for this additional reason, MCR 7.119 governs the appeal of DEQ's decision.

First, Michigan due process considerations required DEQ to provide the steel mill with notice and an opportunity for a contested case as part of its licensing decision. A firm line of Michigan cases establish that licenses have protected rights that entitle them to notice and an opportunity for a hearing in licensing matters. *See Bisco's Inc v Liquor Control Comm*, 395 Mich 706, 717-719, n. 15, 238 NW2d 166 (1976) (a licensee – but not a first-time applicant – has due process interest, and therefore the right to a contested case upon renewal); *Bundo v Walled Lake*, 395 Mich 679, 696; 238 NW2d 154 (1976) (a licensee is entitled to rudimentary due process, including notice and an evidentiary hearing, upon seeking renewal of license); *Bois*

⁵⁷ DEQ Public Participation Documents, Fact Sheet (Feb. 12, 2014), p. 2 (Appendix 1b, p. 9b) (PTI 182-05C would "Revise the PTI 182-05 series of permits by reallocating SO₂ emissions within the stove and casthouse stacks at the blast furnaces."); *id.*, p. 10 (17b) ("The revisions proposed by this permit action (182-05C) do not involve any physical changes or changes in the method of operation at the stationary source beyond what was approved in PTI 182-05B."); DEQ Final Decision, PTI 182-05C (May 12, 2014), (Appendix 5b, p. 171b) ("Proposed correction to PTI 182-05B for the Severstal Dearborn facility located in Dearborn, MI. This correction is to update emission factors from the previously application based on recent emissions test data") (emphasis added).

Blanc Island Twp v Nat'l Resources Comm, 158 Mich App 239, 244; 404 NW2d 719 (1987) (contested case applied to licensee, even where statute did not require issuance of permit to be preceded by notice and an opportunity for a hearing); *cf. Maxwell v DEQ*, 264 Mich App 567, 571-72; 692 NW2d 68 (2004) (“Once given, a license becomes a protected property interest. However, because the same interest is not found in an initial request for a license, due process does not require that a hearing be held at this stage of the permit process.”) (citations omitted).

Second, Section 92(1) of the APA codifies a licensee’s right to notice and hearing prior to changes being made to their license. As discussed above, that provision entitles a licensee to an opportunity to show compliance with all lawful requirements for retention of the license. MCL 24.292(1). In *Bois Blanc Island Twp*, the Court of Appeals considered the nature of the hearing provided in MCL 24.292(1). 158 Mich App at 245. The Court held that an attempt by the Department of Natural Resources (DNR) to evict the plaintiffs (whose sanitary landfill licenses that had long-since lapsed) from state land was a “revocation, withdrawal or cancellation” of an APA license under MCL 24.292, and therefore DNR was required to provide notice and opportunity to show compliance as provided in the APA. *Id.* The Court went on to state:

Although the requirements of MCL 24.292 [] for notice and an opportunity to show compliance have been interpreted to provide for only an informal proceeding, a hearing is nevertheless required. Therefore, we conclude that the contested-case provisions of the APA apply in the present case, entitling plaintiffs to a hearing and notice as provided under MCL 24.271. *Id.* (citation omitted) (emphasis added).

Third, Part 55 of NREPA, the Michigan Air Pollution Control Act, also provides the opportunity for a contested case hearing before DEQ revises any emissions limitations in a permit. MCL 324.5506(14) states:

A person who owns or operates an existing source that is required to obtain an operating permit under this section, a general permit, or a permit to operate authorized under rules promulgated under section 5505(6) may

file a petition with the department for review of the denial of his or her application for such a permit, the revision of any emissions limitation, standard, or condition, or a proposed revocation of his or her permit. This review shall be conducted pursuant to the contested case and judicial review procedures of the [APA]. MCL 324.5506(14) (emphasis added).

By its terms, Section 5506(14) applies to any person who owns an existing source that is required to obtain (1) an operating permit, (2) a general permit, or (3) a non-renewable operating permit. Severstal owned an “existing permit” that was required to obtain an operating permit, and so this part of Section 5506(14) applies. For existing sources that require an operating permit, Section 5506(14) provides that the owner may file a petition for review for (among other things) “the revision of any emission limitation, standard, or condition.” This clause is not limited to revisions of emissions limits in *operating* permits, it applies to the revision of “any emission limitation” (emphasis added). There is nothing in this broadly-drafted language that would exclude revisions of emissions limitations in permits to install. Moreover, emissions limits in permits to install become incorporated into operating permits.⁵⁸

As such, this part of Section 5506(14) gave Severstal the right to file a petition with DEQ for review of DEQ’s revision of the emissions limitations in PTI 182-05B. DEQ’s ultimate revision of the emissions limits was favorable to Severstal, so the steel had no reason to file a contested case, but the *opportunity* was there. As such, DEQ’s decision was required to be preceded by notice and an opportunity for a hearing under MCL 324.5506(14). It is not necessary that a provision of the APA be invoked or exercised in order for that APA provision to *apply* to the decision. And that is all MCR 7.119(A) requires.

⁵⁸ MDEQ Rule 336.1214a. This Rule provides for the consolidation of all federally-enforceable terms and conditions of existing permits to install into the renewable operating permit.

In sum, DEQ's licensing decision here was an amendment or revision of a license or permit, and Severstal was a licensee or owner of an existing source that required an operating permit. Thus, under three different provisions – due process, MCL 24.292(1), and MCL 324.5506(14) – Severstal had the opportunity for a contested case preceding on DEQ's decision.

The decision in *Wolverine Power Supply Cooperative v DEQ* is not to the contrary. 285 Mich App 548, 777 NW2d 1 (2009). That case, which invalidated a DEQ rule allowing a contested case hearing after approval or denial of a permit to install, involved two parties each seeking permits to install for proposed *new* power plants. *Id.* at 550. The Court found the DEQ rule “broadened the method for interested parties to challenge a permit to install a *new source* of air emissions.” *Id.* at 556 (emphasis added). This new-versus-existing source distinction was also recognized by the parties: Wolverine and Mid-Michigan argued that MCL 324.5505(8) “does not allow contested case hearings for *new source* permitting decisions” and Consumers Energy asserted “that the Legislature intentionally excluded contested case hearings for *new source* permits because those permits involve initial licenses and do not require the formal due process protections available to holders of *existing* permits.” *Id.* at 553 (emphases added). Thus, *Wolverine* supports that there is a distinction between the rights of licensees (existing sources) and applicants (new sources), where the former may have the right to a contested case, even if the latter do not. *See also Bisco's*, 395 Mich at 717-18.

In conclusion, because DEQ's licensing decision was required to be preceded by notice and an opportunity for a contested case hearing for Severstal, Section 91(1) of the APA applied, and MCR 7.119 governs the appeal.

CONCLUSION

The Supreme Court should find the citizens' groups appeal was timely under either the 90-day deadline in the Michigan air pollution control statute, or under the 60-day deadline in the Michigan court rules for appeals of agency decisions to which the APA applies.

Date: May 19, 2017

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